No. 83-916

In the
# Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,
*Petitioner,*
vs.
ALLEN WAYNE MORTON,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

## BRIEF OF AMICUS CURIAE SACRAMENTO COUNTY CALIFORNIA AND SACRAMENTO COUNTY DISTRICT ATTORNEY IN SUPPORT OF PETITIONER

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The Amicus Curiae listed on the corner of this brief more specifically request this court reverse the judgment of the United States Court of Appeals for the Federal Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 708 F2d 680. The opinion of the Court of Claims is not reported. For the sake of brevity this brief will cite excerpts from the case in the brief of Petitioner for a writ of certiorari previously filed with this court, the case being reported in full in that brief.

## STATEMENT OF INTEREST

The Sacramento County District Attorney[1] is the law officer of the County of Sacramento (a political subdivision of the State of California) authorized to enforce child support orders. (See 11475.1, California Welfare and Institutions Code; Section 4702 California Civil Code.) The deputy district attorneys appearing on this brief, Mr. Michael E. Barber[2] and Mr. Dan M. Kinter[3], are in fact

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1. This brief is submitted by the Chief Law Office of Sacramento County California and therefore under Supreme Court Rule 36.4 no motion or written consent is necessary for its submission.

2. Mr. Barber, the author of this brief, has been employed in this capacity for sixteen years; he has served as President of the California District Attorney's Family Support Council (1972); a member of the Council of the Family Law Section of the American Bar Association; a Director of the National Reciprocal and Family Support Enforcement Association; and is presently a member of the Executive Committee of the California Bar Association's Family Section. He regularly writes a column for "Fair Share" a monthly newsletter on family law of Harcourt Brace Jovanovich. He has acted as a consultant and lecturer on paternity and child support enforcement for the U. S. Department of Health and Human Services, National District Attorneys Association, California's Continuing Education of the Bar, The American Association of Blood Banks Parentage Testing Committee, The American Bar Association's National Institute and The National Council of Juvenile and Family Court Judges. Mr. Barber was given an award for his outstanding contribution to prosecution by the California District Attorney's Association in 1977, and the Truly B. Knox Award from the California District Attorney's Family Support Council for his outstanding contribution to the child support enforcement program in 1979. His articles on child support have been published in the California Prosecutor's Brief and Family Law publications of the California Continuing Education of the Bar.

3. Mr. Kinter is a member of the U. S. Supreme Court Bar.

assigned to the Domestic Relations Division, the Division of the Sacramento County District Attorney's Office specifically responsible for enforcement of child support orders.

The responsibilities of this office include preparation of garnishment process on civil support orders. There are in excess of 30,000 cases for which this office is responsible for proof of parentage or enforcement of support. Sacramento County files in excess of 700 writs of execution for past due child support, and 500 wage assignment (Section 4701 California Civil Code) for a combination of past and current child support per year. Both forms of process are post judgment garnishments. In addition, the Sacramento County District Attorney is responsible for entry and enforcement of orders under the Uniform Reciprocal Enforcement of Support Act (Sections 1674, 1680, 1681, and 1684, California Code of Civil Procedure). As the law officer given this responsibility, the Sacramento County District Attorney, and the political subdivision that provides the funding for this activity (the County of Sacramento), have a direct and immediate interest in the outcome of this case. The substance of the action, garnishment of the active duty pay and retirement pay of military members and federal employees in general for past due child support, constitutes no small part of this enforcement activity. During the first year the waiver of federal sovereign immunity was in effect under PL 93-647, 1975, this office identified in excess of $500,000 in unpaid child support resulting from orders entered in the Sacramento County Superior Court due from actively employed or retired federal employees. The decision of this court in this matter will not be con-

fined in its impact to cases involving present and retired federal employees. The same enforcement concepts applied to Col. Morton have applied equally to employees of Signal Oil, Texaco Oil, and ARAMCO (*see cases infra*). In this District Attorney's Office, garnishments involving interstate corporations have been levied on wages of employees of Hughes Tool, United Airlines, and Republic National Insurance Company. Should this court choose to uphold what we consider an erroneous opinion of the Circuit Court, it will significantly increase the burden of litigation and decrease significantly the protection that now exists for children deprived of support.

## SUMMARY OF ARGUMENT

Amicus curiae joins petitioner and supports petitioner's position that a facially valid writ of garnishment of a state court for child support protects the federal government, or any garnishee, from liability for reimbursement if it is later held the state court lacked sufficient jurisdiction over the employee to enter the order.

However, it is the position of amicus curiae in fact the state court did not lack jurisdiction and the Court of Claims incorrectly decided this legal issue. There were in this case four separate basis for personal jurisdiction, any of which could have applied to this case. The first is domicile, the second is purposeful use of the jurisdiction, the third quasi in rem, and the fourth is estoppel.

In taking this position, amicus curiae will offer authorities interpreting this court's prior holding in *Kulko*

*v. Superior Court* (1978) 436 U.S. 84 as they apply to this fact situation. In summary, these citations will present to the court fact situations where when the family has been deliberately sent to, or forced to return to, a jurisdiction with which there had been previous contact the courts have found purposeful use of that jurisdiction's facilities sufficient to provide minimum contacts as that term is used in the *Kulko* case.

It is recognized this court in *Kulko* also required a consideration of what will be a fair forum and looked to the Uniform Reciprocal Enforcement of Support Act to provide that forum. It is amicus curiae's position that reliance on that procedural vehicle to provide a "fair forum" is mistaken. Given the disparate economic circumstances of custodial and non-custodial parents, the intendment of the constitutional mandate of due process in this context is to favor the residence of the custodial parent in choosing a fair forum. Otherwise, the injury to the children of a separated family and the taxpayers who all too often end up supporting them is, in practice, irreparable.

Amicus curiae will argue that seizure of property central to the issue of support for children, that is a portion of the paycheck or pension of the obligated parent is a proper jurisdictional basis to enter a support order and has been sanctioned as such by federal courts, and including this court, both in family law cases and in its endorsement of URESA as a procedural vehicle.

Finally, on the issue of jurisdiction, it will be argued that the respondent, Col. Morton, ought to be estopped from denying the validity of the Alabama support order.

His successful completion of his military career was benefited by the method of enforcement of that order chosen by Mrs. Morton. Had she chosen a more direct method of enforcing Col. Morton's obligation to support his children, his military career would have been jeopardized.

As a third and separate issue, amicus curiae wishes to address dicta of the Circuit Court challenging the ability to garnish wages or pensions to enforce support orders. In so doing, we will argue the Circuit Court has either ignored or been uninformed as to constitutional law and established practice dating back to the turn of the century. In its opinion, the Circuit Court alleges an absence of authority to garnish in the state of Alabama. Yet a clear and relatively recent decision of that state's Supreme Court is clearly in support of the garnishment procedure used in this case. Other authority will be presented concerning the due process and full faith and credit considerations related thereto. Because this matter will be before the Supreme Court in the dicta of the court of appeals, amicus curiae will present authority supporting the constitutional basis and practical protections afforded by the garnishment procedure applied in this case.

More specifically, amicus curiae will establish that the court had continuing jurisdiction to enforce its order and that it is universally recognized, even in Alabama, that a court has jurisdiction over the paycheck of a nonresident judgment debtor if the judgment debtor's employer does business in the garnishing jurisdiction. Amicus curiae will also argue that sufficient safeguards are in the law to prevent an unwarranted burden on the support debtor, particularly when balanced against the needs

of that debtor's children. Finally, amicus curiae will offer rebuttal to the circuit court's dicta which suggests procedures under URESA could in some way substitute for this expeditious process.

## ARGUMENT

### I.

### A Garnishee May Rely On Garnishment Process That Is Fair On Its Face.

42 U.S.C. (659(f) giving the United States immunity from suit if garnishment process is "regular on its face" does nothing more than state the general rule applicable to private persons and nothing less. The effort by the Court of Claims and the Circuit Court to construe the term "court of competent jurisdiction" as an additional item into which the federal government must inquire, distorts the plain meaning and intent of the waiver of sovereign immunity by the United States. This subject's monies due from the United States "in like manner and to same extent as if the United States . . . *were a private person*, to legal process" (emphasis added) brought for the enforcement of child support or alimony (42 U.S.C. (Supp V) 659(d)).

The decision below ignores the term "private person", language found in PL 93-647. This term was never repealed, notwithstanding the expansion of the waiver of sovereign immunity to the District of Columbia and the expansion of the original statute to include a number of definitions.

The responsibility of a private person who is a garnishee has been repeatedly defined in case law and in statute. Under the recently enacted California Creditor's remedies legislation, the creditor is given full and complete immunity from liability so long as he complies strictly with "any written order or written notice which purports to be given or served in accordance" with the chapter on garnishment, "unless the employer has actively participated in a fraud" (Section 706.154(b) California Code of Civil Procedure). The comment of the California Law Revision Commission on the purpose of such language is as follows:

> "The employer is not required in such circumstances to go beyond the document itself and is not subject to liability when he complies with its directives, and is not actively participating in a fraud. The remedy of the injured party in such a case is to proceed against the person who . . . improperly obtained the document . . . " (Deerings Annotated California Codes, Code of Civil Procedure, Volume 661-711, page 494).

This statute provides as one of the requirements of the employer that he deliver to the employee notice of the garnishment, deemed in the statute an "earnings withholding order", and a notice of his rights (Section 706.104 California Code of Civil Procedure).

This statute is nothing more than a statement of the case law and accepted practice in this context. *Harris v. Balk* (1905) 198 U.S. 215 makes it clear that the judgment debtor's due process rights are complied with so long as the debtor is given sufficient notice to permit him to defend himself. Subsequent cases go even further. *Blue v. Superior Court* (1956) 305 P2d 209 at 213 states:

> "No one except the judgment debtor may move to quash a writ of execution unless the judgment on which it is issued, or the writ, is void on its face." (Also note *Vest v. Superior Court* 294 P2d 988, for the same proposition.)

In *Associated Oil Co. v. Mullin* (1930) 294 P 421 at 423, the court discusses the right of strangers to collaterally attack a void judgment:

> "A void judgment, however, may be collaterally attacked either by the parties or by strangers. With respect to parties and privies such an attack is ordinarily limited to cases where the judgment is void on its face. . . . But neither the parties, their privies, nor strangers can attack a judgment of a domestic court of record on jurisidictional grounds unless the want of jurisdiction appears on the faces of the record."

Such language raises a serious question as to the appropriateness of this suit.

Finally, in the case of *Agnew v. Cronin* (1957) 306 P2d 527, the court reviewed the duties of a garnishee at length. That case states the position of the stake holder is considered that of a totally neutral individual who discharges his obligation to the debtor by giving him notice and by following the law as stated in the process served on him. The United States has fully complied with its obligations to each in this instance. The Circuit Court ought to be reversed and this action dismissed.

## II.

## The Alabama Court Had Jurisdiction. The Order Was Not Void.

It is further the position of amicus curiae that the order in this instance was valid and that the Court of Claims

and the Circuit Court both misapplied the rule of *Kulko v. Superior Court* (1978) 436 U.S. 84. This significant case on divorce and jurisdiction has spawned considerable progeny since its pronouncement, many cases apparently ignoring its limitations or extending it far beyond its original scope. Thus the Illinois Supreme Court ignored footnote 9 therein in *Boyer v. Boyer* (1978) 383 NE2d 223 and required Mrs. Boyer to return to Georgia to enforce a support order notwithstanding the clear pronouncement of this court in that footnote that a valid and final support order could be enforced in any court in this land. (See also *Morrill v. Tong* (1983) 453 NE2d 1221 where the Massachusetts Supreme Court determined, based on *Kulko,* that suit for enforcement of a Rhode Island divorce order could not be maintained, that Rhode Island was a "fairer forum", notwithstanding the fact the defaulting obligated parent had less contact with Rhode Island than the moving party. The defaulting parent was residing in Spain.) The opinion of the court of claims also failed to properly interpret *Kulko.*

**A. Domicile**

Jurisdiction over Col. Morton could, among other grounds, be based on domicile. It appears clear that if Col. Morton were a domiciliary of Alabama at the time of the divorce, there would be no jurisdictional question (Pet. Brief, 67a). The important date as to domicile in this action is not the date of the judgment, but the date of service. 21 C.J.S. p. 144 states as follows:

"Where jurisdiction of the person or of the res has once attached, it is not defeated by a removal of the person of the res beyond the jurisdiction of the court."

Jurisdiction was not affected by the subesquent erroneous dismissal and reinstatement of the action (Pet. Brief, page 89a). 21 C.J.S. p. 148 states:

> "The rendition of an erroneous judgment which has been vacated after the ascertainment of errors does not deprive the court of jurisdiction to render a proper judgment."

Nor does the failure to file appropriate documentation of Col. Morton's military service (Pet. Brief, 89a). Affect jurisdiction to garnish. This made the judgment voidable, but not void (*Allen v. Allen* (1947) 182 P2d 551.).

The date when jurisdiction would have been perfected was the date of service of the divorce process. The date of service was September 17, 1974. (Pet. Brief, 89a). What Col. Morton did thereafter to change domicile is irrelevant. It is clear from the law, however, that notwithstanding his subjective intent to eventually relocate, Col. Morton retained his original domicile throughout his military career, at least until he took objective steps to become an Alaskan. As is obvious from the record of Col. Morton's failed attempts to become a Floridan, mere subjective desire is not enough to change domicile. However, his objective acts in 1974 were in opposition to his now subjectively proclaimed intent to become an Alaskan in May of 1974. On or about September 16, 1973, Col. Morton told the Air Force he was an Alabaman and so was able to avoid a personal expense in moving his wife and children to that state (Pet. Brief, 54a, 85a). Thus, at least as of that date, he appears to be an Alabaman. He continues to conduct himself as such by filing tax returns there in 1974 (for 1973), and 1975 (for 1974) (Pet. Brief 93a). Such an act is for a member of the

military a claim of domicile (50 U.S.C.A. 574), barring all other taxing jurisdictions from taxing his income or personal property. From all the objective evidence then, Col. Morton was a domiciliary of Alabama at the time of service of the divorce process.

### B. Minimum Contacts

Even if the court finds the subjective after the fact claim of Col. Morton to be a non-domiciliary of Alabama to outweigh his objectives acts contemporaneous with the date of service of the divorce process, his course of conduct and the circumstances of the opposing party are such as to give the State of Alabama jurisdiction. On this concept of jurisdiction, the ruling of *Kulko vs. Superior Court* (supra) is controlling. In that case the court considered the unilateral activity of Mrs. Kulko in moving to California herself and later being joined by the children at the expense of the father who was offering visitation, insufficient to permit the mother to call upon California courts to rewrite a separation agreement as to support and custody.

The facts in this case are clearly distinguishable from *Kulko* in terms of the purpose of the defendant. On similar facts, the State courts have held the limitations of *Kulko* to be inapplicable. In this case Col. Morton did not simply comply with one of those civilities of a divorce too often observed in the breach, visitation. As observed above he deliberately stated he considered the State of Alabama to be his residence, gave custody of his minor children to his wife, and shipped them off to Alabama at government expense. (It is interesting to note that Judge Miller in the Circuit Court seems to misunderstand the role of the second parent in relation to children in that he refers to "Mrs.

Morton and *her* two sons . . ." (emphasis added) (Pet. Brief 3a). Thus, Col. Morton intentionally made his wife and their children domiciliaries of the State of Alabama. This was not the unilateral act referred to in *Hansen v. Denckla* 357 U.S. 235. Col. Morton's separation agreement drafted contemporaneous with shipping his wife and their children back to Alabama referred to reasonable visitation rights (Pet. Brief 63a). Combined with his purposeful act of declaring himself to be an Alabaman in securing government funding to move his wife and his minor children to Alabama, it is obvious he intended to use the services of the state of Alabama including, if necessary, the protection of its courts as to his visitation rights. Col. Morton obviously anticipated that if he did not support his children, either his wife or the state of Alabama would, and not on a temporary basis but throughout their minority. The choice of Alabama as the forum for a divorce can hardly be called the unilateral act of Mrs. Morton. Add to this the fact Col. Morton invoked the protection of Alabama domicile under 50 U.S.C.A. 574 by paying his income taxes there for 1974, the inference that he purposefully availed himself of the laws of Alabama becomes even stronger.

Two cases where state courts have viewed similar situations and distinguished *Kulko* are *In re Marriage of Lontos* (1979) 152 Cal. Rptr. 271 and *McGlothen v. Superior Court* (1981) 175 Cal. Rptr. 129. In *Lontos* and *McGlothen* as in this case, the wife had a substantial contact with the forum state prior to the marriage. In both cases the conduct of the husband and father in the state of residence made it practically impossible for the wife and children to do other than return to her former home in the forum state. In both cases it should be added that the wives

and minor children ended up receiving Aid for Dependent Children under Title IV-A of the Social Security Act, apparently because of the failure of the father to provide for his children.

The *Lontos* case (supra) identifies in *Kulko* a second and separate ground for rejecting Alabama as an appropriate jurisdiction. *Lontos* requires that we must determine that "The husband's activities must be of such quality and nature that it is 'reasonable' and 'fair' to require him to conduct his defense in" (Alabama). (*Lontos* p. 278) In making this determination, the court in the *Lontos* case permits us to consider the alternative forums for litigation.

This review as to fairness is, according to *Kulko,* to be based not on a mechanical test; rather the facts of each case must be weighed to determine whether the forum is fair. Still, even though each case must be weighed individually this court cannot shelter itself by this admonition from the fact that its determination of what is a "fair forum" in his case will have a broad impact on child support enforcement. In this evaluation of "fairness" it is hoped this court will, as did the *Lontos* court, carefully consider the alternatives to litigation in Alabama. As is demonstrated by a recent study on this subject, "The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards", Lenora J. Weitzman, 28 UCLA Law Review 1181, divorce itself tends to consign women and the children of whom they are given custody to greatly diminished resources. If support is not forthcoming promptly, poverty and welfare dependence are inevitable. In selecting a "fair forum" the unequal economic circumstances of the custodial and non-custodial parents must be taken into considera-

tion. As is demonstrated by the facts of this case and verified by the Weitzman study (supra) even when an apparently generous amount of support is paid, when viewed against the obligations the custodial parent is expected to meet, as opposed to the resources that remain in the hands of the non-custodial parent, the ability of the custodial parent to meet the cost of litigation is necessarily limied. Thus, in this case Col. Morton claimed to pay $500 per month voluntarily for the support of his wife and two children after their separation. Obviously this is open to dispute since a garnishment for support based on an order for that amount is the crux of this action. Even taking his statement at face value, he was left with the remainder of his basic pay, his flight pay as an Air Force Colonel, and his tax free subsistence and housing allowance. Mrs. Morton had to meet the cost of supporting herself and two minor children from the $500 per month. Col. Morton had only himself to support from the remainder. It is submitted that Col. Morton had defenses available to him had he chosen to assert them based on his military status that could have restricted and controlled the timing of the Alabama litigation to fit his employment schedule (50 U.S.C.A. 520 et seq.). It is common knowledge that military personnel may fly space available on a standby basis on military aircraft. Thus, the cost of being physically present in Alabama to Col. Morton could have been minimal.

Compare that to the circumstance of Mrs. Morton, assuming she must personally file in Alaska to litigate her right and her children's right to support. She has lost what usually is the chief marital asset, the home, under the separation agreement (Pet. Brief, 3a) and must

now at best depend on Col. Morton's largesse which he claims is $500 per month to support herself and two children. In addition she must retain Alaskan Counsel, and make suitable custodial arrangements for her minor children in Alabama while she litigates their rights in an Alaskan court. Having secured a final decree of divorce in Alabama, she is no longer a military dependent and no longer entitled to "space available" transportation to Alaska. In that litigation in Alaska as in Alabama the demands of Col. Morton's employment permit him to adjust the timing of hearings and to prevent entry of a judgment by default, if he asserts those rights (50 U.S.C.A. 520 et seq.). Obviously when weighing what is "reasonable" and "fair", given the several purposeful acts of Col. Morton previously referred to, the Alabama Court is proper.

It should be noted this court in *Kulko* and the circuit court in this case (Pet. Brief, 19a) have suggested the Uniform Reciprocal Enforcement of Support Act to be a make weight in balancing the rights of each party to permit both parties to have access to a fair forum. Unfortunately it does not work that way either in theory or in practice. As this court has alluded to in *Jones v. Helms* (1981) 107 S. Ct. 2434, and as petitioner has stated in detail in its brief (Pet. Brief, 17) in practice the Uniform Reciprocal Enforcement of Support Act is not a particularly effective method of obtaining or enforcing support. As Prof. David Chamber has documented in his work "Making Fathers Pay", Univ. of Chicago Press, 1980, obligated parents who cross state lines are providers in only about a third of the cases where support is due while those who remain in the jurisdiction regularly pay child support in almost 60% of the cases where it is owed.

Even in theory, when examined structurally it in effect denies the "obligee" as fair a forum as the obligor. It tilts litigation toward the obligor. It requires not merely filing an action and serving process as was the case in this divorce, but filing an action or petition in the court of residence (Section 11, RURESA), a finding by this court of residence that there is a basis for finding a duty of support (Section 13, RURESA), certifying this fact, and forwarding the matter to the responding court (Section 18, RURESA). The responding court must then docket or file the matter a second time (Section 18, RURESA) and notify the prosecutor (Section 18, RURESA). He must then obtain jurisdiction over the alleged obligor, and schedule a hearing in and among all other civil and criminal matters on his calendar (Section 18, RURESA). In the hearing to determine the obligation of support, if any, the obligee is not entitled to the protection of the laws of the initiating jurisdiction. Instead, the support duties under the law of the responding jurisdiction will be presumed to be the applicable statutes and social policy (Section 7, RURESA). If this court is concerned about unilateral acts of either party controlling the litigation and creating an unfair forum to try the issue of support, it need only look at the impact of applying this act to this case. Mrs. Morton under the Revised Uniform Reciprocal Enforcement of Support Act is required to docket this case twice, the petition of support is subjected to judicial scrutiny in two states. The obligor is in effect claiming he can pick the forum whose laws and social policy will control the amount of support and the custodial parent and the children would be required to depend on the calendaring and diligence of a prosecutor who resides many

thousands of miles from her, who she has never met, who knows of her circumstances only what is on a petition that may by the time it reaches him (or her) be literally months old, and who confronts in court a flesh and blood adversary with the local law determining what must be paid to a foreign jurisdiction. It is amazing that it works at all. But it is submitted that it in no way offsets the imbalance in resources of the litigants to substiute URESA for the fair forum provided here by the Alabama courts. The mere delay in the process alone denies the wife and children fairness.

### C. Quasi-in-Rem Jurisdictions

The circuit court in its opinion discounts the applicability of the concept of quasi-in-rem jurisdiction to this type of case (Pet. Brief, 15). To have such jurisdiction, the property attached must relate directly to the cause of action (*Shaffer v. Heitner* (1977) 433 U.S. 186). This test is met by the character of the obligation established. In establishing support, the amount of the paycheck is directly related to the amount of the order. It is not merely the fund from which a contract or tort judgment may be met. Rather it is one part of the verbal formula used in setting support (see the California version of the Uniform Support of Dependents Act, Sec. 246 Calif. Civil Code). Because of its crucial nature to support in dicta in *Diaz v. Diaz*, 568 F.2d 106 the 4th Circuit has suggested that jurisdictional attachment might be a basis for a support order.

Nor is the 4th Circuit the only circuit which recommends quasi-in-rem jurisdiction. Although the Federal Circuit in this case considers quasi-in-rem jurisdiction as be-

ing an inappropriate basis for this support order (Pet. Brief, 16a), it does consider *Vanderbilt v. Vanderbilt,* (1957) 354 U.S. 416 as a guide concerning the basis for jurisdiction (Pet. Brief, 11a), and it offers the Uniform Reciprocal Enforcement of Support Act as a procedural device to obtain a support order (Pet. Brief, 19a) Jurisdiction in *Vanderbilt* (supra) was secured by sequestering Mr. Vanderbilt's property in New York. There was no evidence he was present in New York, or even personally served. The original URESA statute and its revised 1968 version (RURESA) both contain a provision authorizing jurisdictional attachment as an alternative to personal service (See 19(b) 39(a) RURESA). The leading text on this Act and its revisions, "Inter-State Enforcement of Family Support" 2nd Ed. by Brockelbank and In fausto, pub. Bobbs Merriell enthusiastically endorses this procedure. They state on page 50 that failure to use it is something less than diligently prosecuting the case. It is difficult to reconcile Judge Miller's conclusion as to quasi-in-rem jurisdiction with his citation on *Vanderbilt* and his recommendation of URESA.

Amicus curiae recognizes one must also have jurisdiction over the debt to be attached. This requirement has also been filled in this case. Contrary to the position of the majority in the circuit court (Pet. Brief, 15a), it is Alabama law that a salary obligation may be attached where the employer does business (*Orrox v. Orr,* (1978) 364 S. 2d 1170). It should be added that not only is this the law in Alabama but is the rule in the United States and has been since 1899 (*Rock Island v. Sturm,* (1899) 174 U.S. 710, *Taylor v. Taylor,* (1969) 254 N.2d 445). The test of jurisdiction over the paycheck is met. Were this

court to determine that in fact a paycheck, its amount, and payment therefrom, directly related to setting an adequate spousal and child support order, certainly a logical correlation, the test for quasi-in-rem jurisdiction would seem to have been met.

### D. Estoppel

21 Corpus Juris Secundum, page 162 states: "A party will be estopped to question the courts jurisdiction if he . . . accepts benefits resulting from the court is exercise of jurisdiction."

Admittedly, Col. Morton resisted throughout the history of this litigation accepting this divorce decree except as to the divorce itself (Pet. Brief, 87a, 89a, 90a, 91a). However, although he claimed to have met his obligation to his ex-wife, Alabama claimed otherwise and in process fair on its face, garnished his pay for child support (Pet. Brief, 91a). Respondent did attempt to persuade the Air Force Finance Division to not honor the garnishment (Pet. Brief, 38a, 39a, 40a, 41a). He, however, made no attempt, at least on the record to intervene with the Alabama courts to stop the garnishment for spousal and child support, notwithstanding that at this time he was acting on the advice of counsel (Pet. Brief, 30a). Yet under 50 U.S.C.A. 523 he could have objected to the jurisdiction of the Alabama Court and at least temporarily halted the seizure of funds. He failed to do so it is submitted, because to do so could well have placed him in violation of Air Force regulations concerning the support of minor children Air Force Regulations 35-18 Para-

graphs 3 and 5(b). The allegations that support the garnishment in Alabama, also can be construed to constitute an allegation of non-support under appropriate Air Force Regulations. (Air Force Regulations 35-18 Paragraphs 3, 3(b) and 5(b). If in fact the judgment in Alabama is void, as Col. Morton contends, he would have been obligated to provide a sum that would have exceeded the support order (Air Force Regulations 35-18 Paragraph 5(b)). By stopping that orders enforcement he would have had to live within the rather harsh prescriptions of his employer. (This is not to say that in any way the Air Force provided Mrs. Morton with an alternative "fair forum". At the most it could have discharged Col. Morton administratively (Air Force Regulations 36-2 Paragraph 4) or by court martial (10 U.S.C. 894, 933). No funds to Mrs. Morton or the children would have resulted from this process.) By not stopping enforcement but rather by collaterally attacking that order in this proceeding he has lived in the best of all possible worlds. He has provided, however grudgingly, support for his minor children under a court order that limits his liability. He has avoided by meeting the order in this manner, the embarrassment of a claim of non-support and an investigation thereof, or a requirement that he met the Air Force standard until he got a valid order. He has been permitted to complete his twenty years of active duty which qualifies him for a retirement check, and now sues the Air Force to get his money back. Given the fact that, at least on this record, the judicial procedure involved here not only permitted him to remarry but also to complete his required military service with an unblemished record, he should be estopped from challenging the jurisdictional basis of that order.

## III.

### Dicta In The Circuit Court Opinion Is Contrary To Constitutional Law Concerning Garnishment Of Salaries.

There is a suggestion in footnote 10 on page 16a of Petitioner's Brief that the whole concept of garnishment of wages based on jurisdiction of the employer is invalid because the wage obligation is not garnishable in the state of this judgment unless the judgment debtor is also present in that state. Such is not the law in the state of Alabama (*Orrox v. Orr* supra), contrary to the statement of the Circuit Court (Pet. Brief, 15a). Nor has it been the law in the United States since 1899 (*Rock Island Line v. Sturm* (1899) 174 U.S. 710). While not the issue on which the circuit court opinion turned it is offered by that court as an alternative basis for an adverse decision and could, unless addressed, be a basis for liability, assuming for arguments sake, this court did not discover its erroneous character.

Since it is doubtful this would happen, it would not normally be necessary to rebut what is dicta, however erroneous. However, if this dicta is permitted to stand unchallenged, it could affect future litigation on this subject. It is requested that this dicta be addressed by the court and this response is offered in support thereof.

*Rock Island Line v. Sturm* (supra) recognizes the concept that debts belong to the creditors to whom they are payable. However it carries this analysis one step further and recognizes a right of action in the judgment creditor against any debtor of the judgment debtor, in any forum the judgment debtor could himself have brought

suit. Later claims by the judgment debtor against the garnishee may be defended based on the full faith and credit clause (Art. IV, Sec. 1 U.S. Constitution). So long as adequate notice of the garnishment is given the judgment debtor he has been accorded due process of law and his wages may be surrendered to the judgment creditor or rather the agent of the garnishing court. (*Harris v. Balk* (1905) 198 U.S. 215). In the context of family support full faith and credit applies only to installments of support that have accrued and became final and non-modifiable as a matter of state law (*Sistare v. Sistare* (1910) 218 U.S. 1, *Yarborough v. Yarborough* (1930) 290 U.S. 202, In re Marriage of *Crookshanks* (1974) 116 Cal. Rptr. 10), or because a subsequent proceeding under state law rendered the accrued installments final and non-modifiable. (*Griffin v. Griffin* (1946) 327 U.S. 220). This because only such sums constitute a judgment for the purpose of applying the full faith and credit doctrine to enforcement process of the trial court. (*Sistare* (supra)).

Even with those limitations and the protections provided by the Consumer Credit Protection Act (15 U.S.C. 1673) the concept has proven highly effective in protecting the rights of abandoned spouses and children. Thus an employee of Signal Oil who left Illinois after his divorce and took up residence in Texas still found he had to meet the order of the Illinois Court (*Taylor v. Taylor* (1969) 254 NE 2d 445), as did a New York obligor residing in Texas but employed by Texaco (*Texaco Inc. v. Louis Le fevre* (1980) 610 S.W.2d 173) as did a former citizen of the District of Columbia employed by ARAMCO in Saudi Arabia (*Pray v. Pray* 5 Bureau of National Af-

fairs Family Law Reporter page 2945). We also have the example of Mr. Orr of *Orrox v. Orr* (supra).

It should be noted that due process requirements of *Sniadack v. Family Finance Corp.* (1979) 395 U.S. 337 are met by the prior hearing which resulted in the order of judgment for support. (*Wyshak v. Wyshak* (1977) 138 Cal. Rptr. 811; Marriage of Crookshanks (supra) or in the hearing that makes such installments final (*Griffin*). Thus contrary to implications in the circuit court opinion, this case (*Sniadack*) is inapplicable. (Pet. Brief, 10a).

The suggestion in footnote 14 of the majority opinion of the Circuit Court (Pet. Brief, 12a) that these post judgment orders should be fed into the URESA system, would work an injustice on the judgment creditor and the public that all too often is supporting this judgment creditor. Even if the system were far more effective than it is (see description above under "minimum contacts") this would give the obligor a unilateral right to pick and choose the forum in which to enforce the order, contrary to the reasoning of *Hansen v. Denckla* (supra). It would not provide in many instances a "fair forum" or any forum for enforcement, since there may be no other forum for garnishment. Thus in *Taylor* (supra) and *Texaco Inc.* (supra) a Texas domicile would have shielded the obligors from paying had the Illinois and New York plaintiffs been required to sue in Texas. In *Pray* (supra) there was no other "fair" forum between the District of Columbia and Saudi Arabia.

Finally, to require relitigation of the support award as suggested by Judge Miller of the Court of Claims

every time the obligor moves is deprive the obligee of due process in a very fundamental sense. Having successfully and fairly litigated the issue of support the obligee would now be deprived of support by the unilateral act of the obligor. In the words of Justice Rutledge in footnote 4 of the dissent in *Griffin* (supra):

> "Because delay so often results in loss of substantial rights, the effect frequently will be also to make impossible the ultimate as well as the immediate collection of what is due; and to substitute a right of life-long litigation for one of certain means of subsistence".

It is requested this court repudiate the dicta in the circuit court opinion and affirm the holdings in *Taylor* (supra) and *Orrox* (supra).

## CONCLUSION

For all the foregoing reasons, the Petitioner's prayer to reverse the ruling of the Court of Claims and dismiss this action should be granted.

Respectfully submitted,

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March 1984.